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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 474

CLINTON GARDNER,

Petitioner,

*against*

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Clinton Gardner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 28, 1958. The said judgment of the Court of Appeals affirmed the conviction of this petitioner on the conspiracy count of a seven count indictment which charged the petitioner, together with two co-defendants, Alastair Kyle and Toys of the World Club, Inc., with using the mails to defraud and conspiring to do so. This petitioner, who was acquitted on the six substantive counts of the indictment, was sentenced to imprisonment for six months. Petitioner's co-defendants were convicted on all seven counts of the indictment. These convictions, too, were affirmed by said judgment of the Court of Appeals.

## Opinion of Court Below

A copy of the opinion delivered by the Court of Appeals is appended to this petition. This opinion has been reported at 257 F. 2d 559, *sub nom. United States* v. *Kyle, et al.* The Trial Court did not deliver an opinion.

## Jurisdiction

The judgment of the Court of Appeals was entered on July 28, 1958. A timely petition for rehearing was filed on August 11, 1958. Rehearing was denied by order dated and entered on October 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

## Question Presented

Whether it is a deprivation of due process of law to deny a defendant in a criminal case, who has taken the witness stand in his own behalf, the right to explain away apparent prior inconsistent statements introduced by the Government on his cross-examination, thus depriving him of the right to rebut a sharp attack upon his credibility. Whether it is particularly so in a close case such as the instant one where the petitioner was acquitted on the six substantive counts of the mail fraud indictment and convicted only on the conspiracy count.

## Statutes Involved

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any man-

ner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (62 Stat. 701)

18 U.S.C. § 1341. Frauds and swindles.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (62 Stat. 763, amended 63 Stat. 94)

18 U.S.C. § 1342. Fictitious name or address.

"Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office

Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (62 Stat. 763)

## Statement

On August 3, 1956 a seven count indictment was filed against petitioner Gardner, and against his co-defendants, Alastair Kyle and Toys of the World Club, Inc., charging six counts of mail fraud (18 U.S.C. §§ 1341, 1342)* and one count of conspiracy to commit mail fraud (18 U.S.C. § 371).

In substance the indictment charged that defendant Toys of the World Club, Inc. was engaged in the business of selling toys on a subscription basis and that the defendants continued to solicit subscriptions after they knew the corporation was hopelessly insolvent. There is no charge that the corporation was organized for an illegal purpose or that there was any illegal activity during the first seven months of its total existence of approximately 14 months.

Defendant Kyle was president-treasurer and petitioner Gardner was secretary of the corporate defendant during the indictment period. The indictment alleged that the

* It may be noted that although each of the first six counts is labeled as constituting a violation of 18 U.S.C., §§ 1341 and 1342, there is nothing in the indictment itself which charges any violation under § 1342.

defendants mailed circulars containing fraudulent statements, as follows: 1. that defendants had present sources to supply toys from remote parts of the world; 2. that the corporate defendant was able to make full refund to dissatisfied subscribers whereas they knew it was not financially able to do so; and 3. that defendants created the impression that certain eminent persons had endorsed and vouched for defendant Toys of the World Club, Inc., when they had not done so.

The trial began on November 4, 1957 and continued through November 19, 1957 when the jury returned a verdict of guilty on all counts against defendants Kyle and Toys of the World Club, Inc. and acquitted petitioner Gardner on each of the substantive counts but convicted him on the conspiracy count. On December 19, 1957 petitioner Gardner was sentenced to six months' imprisonment.

An appeal was taken to the United States Court of Appeals for the Second Circuit based on three grounds:

1. The evidence against petitioner was insufficient to sustain his conviction.

2. The Trial Court erred in excluding evidence proffered by petitioner, both on his direct case and upon re-direct when the petitioner's evidence was offered to explain away alleged prior contradictory statements introduced by the Government on cross-examination for the admitted purpose of attacking petitioner's credibility.

3. The Trial Court erred in charging the jury that if false statements had been made, they could find the defendants guilty if the defendants had no reasonable ground to warrant their belief in the truth of such statements.

On July 28, 1958, the Court of Appeals affirmed petitioner's conviction. Petitioner then filed a timely peti-

tion for rehearing contending that the Court of Appeals had misconstrued the arguments relating to the exclusion of evidence which had been submitted in his behalf. This petition was denied on October 2, 1958.

## Reasons for Granting the Writ

It is believed that a clear understanding of the issue raised by this petition requires a prior reference to Monthly Publications, Inc., a company which never had any connection with the defendant corporation. Upon the trial, petitioner Gardner took the stand on his own behalf, and was, in fact, the only witness offered by any of the defendants. He was on the stand almost three days. He denied that he had participated in any phase of the management of the defendant corporation's toy business although he was its advertising consultant and its *pro forma* secretary. He attempted to show that he had become associated with the defendant corporation as an independent entrepreneur (and not as an employee), on the express understanding that it was to be for a limited time and on a part time basis, because his main interest and preoccupation was the preparation of his own new magazine which was scheduled for publication in a few months. Petitioner's own publishing venture, entirely unrelated to defendant Toys of the World Club, Inc., was called Monthly Publications, Inc. After a number of questions on this subject had been answered by the petitioner on his direct case, this line of testimony was excluded by the Trial Court as irrelevant and the Trial Court ruled that petitioner would not be permitted to introduce or show to the jury the actual work he had produced for Monthly Publications, Inc., including a dummy of the proposed new magazine, during the period he was associated with the defendant corporation. This exclusion on Clinton Gardner's direct case is not here presented as a ground for granting a writ of certiorari

although it was raised as error upon the appeal before the Court of Appeals.

When petitioner was cross-examined by the Government, however, the prosecutor, sharply, directly and admittedly, attacked petitioner's credibility by seeking to show he had not told the truth, in the testimony he had been permitted to give, about his preoccupation with and the work products he had prepared for Monthly Publications, Inc. The following, which appears at pages 868-870 of the Record,* took place during the cross-examination:

> "Q. Mr. Gardner, did you ever write in November, 1955, 'Monthly Publications remains wholly dormant,' did you ever say that? A. I believe I did.
>
> Q. Now, were you telling the truth to the person to whom you wrote this letter? (The letter apparently containing the statement referred to in the preceding question was held by the prosecutor in his hand and was not shown to the witness or counsel or marked in evidence.) A. Yes, I was. • • • May I explain this?
>
> Q. Just answer my questions, Mr. Gardner.
>
> • • • • • •
>
> Q. Do you want to change your statement that you made to us yesterday that you were working—you were devoting substantial time during the month of November, 1955, to Monthly Publications, Incorporated? A. I did not make that statement yesterday.
>
> Q. As a matter of fact, Mr. Gardner, all during the year 1955, Monthly Publications, Incorporated, never published any documents, isn't that right?
>
> • • • • • •

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* The Court of Appeals granted permission to the appellants to hand up three copies of the typewritten stenographer's minutes; and filing of the appellants' appendix was dispensed with. References to the "Record" are to pages of the stenographer's minutes.

The Court: Was anything that came from the corporation printed at all?

The Witness: Mimeographed primarily.

Q. Sent out to the public? A. No."

On re-direct examination counsel for petitioner reverted to this subject matter for the purpose of countering these attacks on Gardner's credibility and explaining away the apparent prior contradictory statements. It is again mentioned that, as appears from the Record (pp. 852-3), the dummy of the magazine which Gardner had prepared and which was excluded on direct examination was present in the court room.

The purpose of Gardner's counsel on re-direct as stated in the Record (p. 971), was to show "in some detail about the work he (Gardner) did for Monthly Publications, Incorporated throughout the year of 1955". The Trial Court at first ruled the testimony would be admitted but reversed itself when the prosecutor insisted that all he had shown on cross-examination "was that the witness (petitioner Gardner) had made a contradictory statement. There is no question, no matter in issue here about how much time he spent. It is whether he told one thing on the stand and told another thing to somebody else. * * * It goes to his credibility as a witness. * * * It is merely the contradictory statement of the witness, going to his credibility." (Record, pp. 970-71).

The Court of Appeals disposed of this point in its opinion by holding: "Details of his publishing enterprise had nothing to do with his guilt or innocence of the charge for which he was being tried and this testimony was properly excluded." (*United States* v. *Kyle et al.*, 257 F. 2d 559, 564 (2d Cir. 1958)).

* * * * *

On the basis of the decision of the Court of Appeals for the Second Circuit affirming the decision of the Trial

Court rejecting petitioner's explanatory testimony, it is respectfully submitted that a writ of certiorari should be granted for the following reasons:

1. The decision of the Court below in the instant case is directly in conflict with the following decision:

*United States* v. *Michener*, 152 F. 2d 880 (3rd Cir. 1945); and substantially in conflict with:

*Affronti* v. *United States*, 145 F. 2d 3 (8th Cir. 1944);
*Barrett* v. *United States*, 82 F. 2d 528 (7th Cir. 1936);
*Farabaugh* v. *Baltimore & O. R. Co.*, 96 F. Supp. 205 (W. D. Pa., 1951)

These cases establish the proposition that a witness, even when not a defendant, has the right, in order to protect his credibility, to explain away apparent prior inconsistent statements brought out on cross-examination. This is true even if the statements are not relevant to the main issue.

The decision in the Court below is believed to be erroneous and the conflicting decisions hereinabove cited are believed to be correct. As the Court said, per O'Connell, C. J., in *United States* v. *Michener*, *supra*, at page 884:

> "It is further clear that in the usual case, not involving impeachment of one's own witness, where prior inconsistent statements are shown, the witness must be given an opportunity to explain away the apparent contradictions, if such a reconciliation be possible: Conrad v. Griffey, 1853, 57 U. S. 38, 16 How. 38, 14 L. Ed. 835; The Charles Morgan, 1885, 115 U. S. 69, 5 S. Ct. 1172, 29 L. Ed. 316; Southern Transp. Co. v. Ashford, 5 Cir., 1931, 48 F. 2d 191; 3 Wigmore Evidence, Sec. 1044. Since, in the case at bar, Government counsel's objective (after being 'surprised' by

what his witnesses said on the stand) was to *discredit* the testimony in chief, it remained for the defense counsel to bring out, by means of further questioning, any explanation which might weaken or eliminate entirely the apparent inconsistencies shown by Government counsel. It is no answer that defendant might have called these witnesses as his own at a later phase of the proceedings. Heard v. United States, 8 Cir., 1919, 255 F. 829. We conclude, therefore, that defense counsel should have been permitted to cross-examine these two Government witnesses to elicit, if possible, statements tending to reconcile the apparent contradictions. To deny him such right, over protest, was reversible error."

In addition to the foregoing cases, Wigmore on Evidence, (3d Ed.) at Sec. 1044 gives the rationale underlying the right of a defendant, or in fact any impeached witness, to explain away an apparent prior contradictory statement as follows:

"Subdivision 5—Explaining Away Inconsistency

§ 1044 In General: In accordance with the logical principle of Relevancy (ante, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject and therefore that there has been some defect of intelligence, honesty or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory, but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received: * * *"

In the instant case a sharp, direct, admitted attack on the credibility of the petitioner was permitted but petitioner was not allowed to correct the attack by explaining away what appeared to be inconsistent statements.

Petitioner was acquitted on six substantive counts of mail fraud and convicted only on the conspiracy count, reflecting the fact that the case against him was a close one. It was most essential to petitioner's defense that his credibility as a witness remain untarnished. To permit a one-sided attack on his credibility and to prevent him from explaining away the apparently damaging inconsistencies constituted plain and substantial error and deprived petitioner of a fair and impartial trial.

2. The question presented is of great importance in the administration of the criminal law. Where the defendant in a criminal case is a witness testifying on his own behalf, his credibility is a vital factor and to prevent him from explaining away an alleged contradiction is to deprive him of the fundamental right to present himself to the jury as an honest man. The error is particularly acute in a conspiracy case where, it is generally agreed, prosecutors enjoy numerous procedural advantages. *Kotteakos* v. *United States*, 328 U. S. 750, 772-74, 776-77 (1946); *Von Moltke* v. *Gillies*, 332 U. S. 708, 728 (1948) (concurring opinion). See *Note:* The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276 (1948). These advantages include the right to try large numbers of defendants together at the expense of possible confusion on the part of the jury and of unwarranted imputation of guilt, the right to submit a case to a jury without proof of a formal agreement and to permit the jury to draw broad inferences of the agreement and intent from evidence of an amorphous context of acts, circumstances, and conduct, and the right to introduce masses of evidence otherwise inadmissible and often confusing to a jury—"subject to connection."

The instant case is a classic example of the sometimes insurmountable prejudice imposed on a defendant who is swept "• • • within the dragnet of conspiracy" *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir.), affd. 311 U. S. 205 (1940). Upon the trial, the overwhelming bulk of the evidence introduced by the Government was admitted against petitioner "subject to connection" and at least 20 exhibits introduced by the Government were excluded as to him.

Petitioner concedes that the advantages which the prosecution enjoys in a conspiracy case are firmly embedded in the law and they are not attacked here. Petitioner contends, however, that a defendant in a conspiracy case is peculiarly entitled to full protection of the rights which he does possess. More than in any other type of criminal case, it is essential that he have every opportunity to show he is an honest man, every opportunity, "• • • to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch* v. *United States*, 336 U. S. 440, 454 (1949) (concurring opinion).

Every criminal case in the federal courts, and especially every conspiracy case, in which a defendant takes the stand in his own behalf offers the possibility of an attack on a defendant's credibility which may go unanswered, and it is submitted that a final determination of the question presented is vital to the administration of criminal justice.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

JACK HART,
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Of Counsel.

# APPENDIX

*United States of America* v. *Alastair Kyle, Clinton Gardner and Toys of the World Club, Inc.*,

257 F. 2d 559 (2d Cir., 1958)

UNITED STATES of America,
Appellee,

v.

ALASTAIR KYLE, CLINTON GARDNER and Toys of the World Club, Inc., Appellants.
No. 378, Docket 25064.

United States Court of Appeals
Second Circuit.

Argued June 9-10, 1958.

Decided July 28, 1958.

RYAN, District Judge.

Defendants Kyle and Toys of the World Club, Inc. appeal from a judgment of conviction on a seven-count indictment charging them with conspiracy and six substantive violations of the mail fraud statute (Title 18 U.S.C.A. Secs. 371, 1341 and 1342). Defendant Gardner appeals separately from the conspiracy conviction—he was acquitted on the substantive counts. The individuals received prison sentences: Kyle one year and a day to run concurrently on each count; Gardner, six months, and the corporate defendant a fine of a total of $1,400 on all counts.

The evidence produced on the trial was undisputed; none of the defendants called any witnesses and only Gardner testified in his own defense. All the defendants on this appeal attack the sufficiency of the evidence and in addition Kyle and Toys of the World Club urge error on the part of the trial court in (1) excluding evidence of Gard-

ner's intent, (2) curtailing cross-examination of a Government witness, and (3) admitting collateral prejudicial matter; they also urge prejudice resulting from the prosecutor's summation. Defendant Gardner urges error in the court's exclusion of evidence material to his defense and in its charge on criminal intent.

The indictment charged that beginning prior to June, 1955 and continuing through August 3, 1956 (the indictment date), defendants did defraud and obtain money by the mailing of false and fraudulent circulars selling and offering to sell membership in a gift toy club known as Toys of the World Club, Inc. The fraudulent statements contained in the circulars were alleged to be (1) that defendants had a present supply of toys for the subscription periods, (2) that they were able to make full refund to any dissatisfied subscriber and (3) that certain eminent persons had endorsed the plan, when in fact defendants knew they had no such supply of toys, that they were financially incapable of making any refunds as promised and that they had no such endorsements. Each of the six counts charges a separate mailing to a named person during the period of September through December, 1955. The seventh count charges a conspiracy among the three defendants to use the mails to execute their fraudulent scheme and obtain money by false pretenses through the mailing of circulars and "lulling" letters and cards to named subscribers.

The evidence was that in November, 1954, defendants Kyle and Gardner as president and secretary-treasurer, respectively, began a mail order toy business under the name of "Toys for a Year, Incorporated," which in March, 1955 became defendant Toys of the World Club. The plan as described in the brochures sent out consisted in soliciting paid up subscriptions on a 3-month ($7), 6-month ($12) and 12-month ($22) basis for the receipt by the subscriber of a distinctive toy from a foreign country for each month

of the subscription period, and in addition, a free introductory toy—a Tyrolean Village block set. This toy it was promised in the brochure would be mailed to the subscriber at once and if it did not satisfy the subscriber, upon demand defendants would at any time make a full refund of the amount paid for the subscription for any toys not already shipped. The brochure also represented that the club had an advisory panel who approved the story pamphlets which would accompany each toy describing its background.

Beginning in June, 1955, defendants commenced mailing out systematically hundreds of thousands of these brochures which reached the staggering figure of seven million by December and in response to which they received a total of $385,000 in paid subscriptions. At the time of this mailing in June, 1955, defendants' eight-month old business was operating at a loss of about $42,000 and was in default to its trade creditors and to subscribers of the former plan (Toys of the Year), on the bonus toy as well as on toys subscribed for. Defendants' insolvency grew steadily; by October, 1955, they were completely out of cash and the deficit had reached the sum of $264,000, by December, 1955 it was $355,000 and continued to increase until the discontinuance of operations early in 1956. Hand in hand with this mounting, hopeless insolvency during this time went the pouring into the mails of millions of circulars promising toys in exchange for money, and this, in spite of default in delivery of toys and complaining letters from subscribers. During the entire period that Toys of the World operated there was no one subscriber who received all the toys for which he had paid. In order to appease impatient subscribers, defendants sent out two types of letters in which they gave as reasons for not sending the bonus toy difficulty in obtaining the particular wood needed and delays in manufacture abroad. The real reason, as the jury found defendants were only too well aware, was

their inability to prepay for the toys to be imported by placing letters of credit with the manufacturer abroad in accordance with the agreement they had made; they knew that without such prepayment there was no supply of toys available for subscribers. In fact, defendants during this six-month period (June-December, 1955) were unable to pay the printer for their brochures and were forced to contract with a new printer; numerous checks in large denominations in purported payment of trade debts and toys were returned for "insufficient funds" with monotonous regularity and the stopping of payment on checks issued was a regular business practice of the company. In October, 1955, they were unable to pay the employees' quarterly withholding tax. They refunded no part of any money collected and yet they continued to solicit subscriptions. In November, 1955 they sent over three million circulars guaranteeing delivery of the free toy by Christmas, when performance, it was obvious, was impossible as they had stopped payment on a check sent to pay for these very toys. Finally, in December, 1955, defendants Gardner and Kyle took over $50,000 of subscribers' checks to a check cashing agency where they falsely certified in writing that they were the sole stockholders and authorized to cash the checks, the proceeds of which they then deposited in a non-corporate account in Canada over which Kyle had sole control, and for these funds they have never accounted. Any attempted last minute explanations as in the Kyle reply brief may not be considered by this Court.

Defendant Gardner's active and knowing participation with Kyle and the corporation in the swindle is amply sustained by the evidence. He was secretary-treasurer of the corporation and remainded so until close to the end in December 12, 1955, at a salary of $1,000 per month; he helped draft the brochures and the lulling letters to the subscribers; he employed his talents as a mail expert to conduct

the intensive campaigns and to estimate the returns; he stopped payment on checks; he accompanied Kyle to the check cashing agency and falsely certified as to their control and authority; he deposited some of these moneys in the non-corporate account; he was fully aware of the company's financial condition for he made it a three-month loan at 80% interest and drew up a memorandum of its financial condition. Whether he be called a mailing consultant or an officer and director of the corporation his was a knowing and active participation in the operations of the defendant club. The evidence of the corporate insolvency, its continuing defaults and regular systematic solicitation and receipt of money through the making of promises it knew it had not and could not fulfill and its retention of these substantial sums in the face of such knowledge more than justified the jury in finding a scheme to defraud by the use of the mails and a finding that Gardner was a party to the scheme. United States v. Tellier, 2 Cir., 1958, 255 F. 2d 441; United States v. Epstein, 2 Cir., 154 F.2d 806, certiorari denied sub nom. Epstein v. United States, 328 U.S. 858, 66 S.Ct. 1350, 90 L.Ed. 1629; United States v. Mortimer, 2 Cir., 118 F.2d 266, certiorari denied 314 U.S. 616, 62 S.Ct. 58, 86 L.Ed. 496; United States v. Fradkin, 2 Cir., 81 F.2d 56, certiorari denied 297 U.S. 720, 56 S. Ct. 598, 80 L.Ed. 1005; Bentel v. United States, 2 Cir., 13 F.2d 327; Knickerbocker Merchandising Co. v. United States, 2 Cir., 13 F.2d 544.

Defendant Gardner was charged with fraud and evidence of his intent by direct testimony on his part as to his belief and motive was material; such evidence if believed by the jury might tend to repel the inferences of fraudulent intent revealed by his activities. Miller v. United States, 10 Cir., 120 F.2d 968; Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed. 465; Sparks v. United States, 6 Cir., 241 F.777; Buchanan v. United States, 10 Cir., 233 F.257. Gardner during cross-examination by Kyle's

counsel was interrogated concerning expected returns from pre-Christmas mailings based on lists and estimates prepared by the witness; the returns had fallen over 50% below his estimates. The two questions asked of him which were proper and to which he should have been permitted to make answer were whether his predictions were based on "sound business methods" and on an "honest opinion." Although objection was sustained at the time this line of questioning was not precluded by the trial judge; ample opportunity was presented to counsel right after that to renew this line of inquiry when over the Government's objection he introduced in evidence and questioned Gardner extensively from the chart of estimated returns and mailings prepared by him (Ex. JJ); still further opportunity was presented to Gardner's counsel when on redirect he specifically examined the witness concerning the chart. Although this appears to have been the logical time and place to ask the questions objected to neither counsel availed himself of it. In any event, the importance of this testimony at that precise moment when weighed with the evidence in the entire case fades, for it related only to the last three mailings and other evidence showed this witness's Gardner participation in the four prior mailings and in diverse corporate activities; he had moreover on his direct examination testified at length as to his knowledge and motives.

Six exhibits were received in evidence through the Government's witness Meesig, a postal inspector and accountant, which were summaries of three balance sheets and three profit and loss statements drawn from the corporate books in evidence. The books had been established by the company bookkeeper as all the corporate books kept in the regular course of business. These summaries, it was clearly shown, were based only on what was reflected in the books in evidence. United States v. Weinbren, 2 Cir.,

121 F.2d 826; United States v. Park Avenue Pharmacy, 2 Cir., 56 F.2d 753. Extensive cross-examination as to the accuracy of the summaries and the books was permitted; there was no evidence that the corporation had assets or liabilities other than those recorded on the books, and there was consequently no reason for permitting counsel to cross-examine on items not contained in the books, save to promote confusion and argue with the witness. The wide latitude favored in cross-examination does not extend to matters not in evidence; if defendants had anything to controvert the witness's testimony they could have called an accountant of their own. United States v. Schenck, 2 Cir., 126 F.2d 702, certiorari denied sub nom. Moskowitz v. United States, 316 U.S. 705, 62 S.Ct. 1309, 86 L.Ed. 1773.

Evidence of unpaid bills, demands for payment from creditors, checks returned for insufficient funds and because payment had been stopped and the testimony of creditors was proper and relevant on the question of the financial ability of the defendant corporation to perform its promises and defendants' knowledge of it, as was also the evidence of the diversion of checks to the Canadian non-corporate account. All this was material on defendants' intent and absence of good faith. United States v. Epstein, supra. There was no objection taken then by either defendant as presumably they realized that it was relevant.

What defendants now characterize as "inflammatory and personal vituperation" and a "heated appeal to passion" by the prosecutor on summation apparently failed to stir either of them or their counsel at the time of the utterances into voicing an objection or a request for a direction from the court. Rule 51, Fed.R.Cr.P., 18 U.S.C.A. The reference to two of the jurors by name by the prosecutor in the course of an argumentative illustration was innocuous; the comment on the appearance of the defendants was obviously a rebuttal of their counsel's description

of them as "misguided" "immature young men." It added nothing to the case and might have been better omitted but it was certainly not "injurious to the accused." Sparks v. United States, supra, 241 F. 790.

Gardner had testified as to his great interest and activity prior to the indictment period in a completely unrelated venture—the publishing of a magazine "Monthly Publications." There was no dispute as to this by the Government; the evidence showed that Gardner was engaged in both activities simultaneously although deriving income only from the defendant corporation. Details of his publishing enterprise had nothing to do with his guilt or innocence of the charge for which he was being tried and this testimony was properly excluded.

Finally, and on this appeal for the first time, Gardner objects to a portion of the charge defining fraudulent intent. Experienced trial counsel neither took exception to the charge nor made request for further instructions even after specific inquiry by the court. Rule 30, Fed.R.Cr.P.

The instruction complained of, isolated from the rest of the charge, reads:

> "It is not necessary to constitute a fraud that an individual making a false statement should know precisely that it is false. It is sufficient if it be false and if he made it recklessly and without an honest belief in its truth or without reasonable ground for believing it to be true" (R. 1130-31).

These words, particularly "recklessly" and "without reasonable ground for believing it to be true" would, standing alone, eliminate good faith as a complete defense, if established, to the crime of fraud. That conscious knowing intent to defraud is one of the two essential elements of the mail fraud statute has long been established. Durland v. United States, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709;

United States v. Kram, 3 Cir., 247 F.2d 830; Silverman v. United States, 5 Cir., 213 F.2d 405, certiorari denied 348 U.S. 828, 75 S.Ct. 46, 99 L.Ed. 653; Knickerbocker Merchandising Co. v. United States, supra; Sandals v. United States, 6 Cir., 213 F.569. But this instruction was preceded and followed by other instructions correctly setting forth the requirements which the jury would have to consider before it could find defendants guilty. Thus, the trial judge charged that intent to commit a fraud or make a false promise is an essential element, that without it there can be no crime, that the mere fact that defendants were unable to perform their obligations is no crime, that if they acted honestly and with a justifiable belief and in good faith this would be a complete defense. Any confusion from this inconsistency (probably more apparent to the legal mind than to that of the layman) which might have resulted could have been cleared up by timely request for further instructions. Counsel's silence, while undoubtedly a waiver of their right to bring this issue up now, Rule 30, supports our conclusion that the charge when heard in its entirety correctly and fairly stated the law and that the effect of the language complained of was not such as to permit a wrong conclusion on the part of the jury (Miller v. United States, supra), or tip the scales in favor of conviction. Screws v. United States, 325 U.S. 91, 65 S.St. 1031, 89 L.Ed. 1495; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The conviction is affirmed.

*Appendix.*

## Judgment of the Court Below.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

* * * * * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eight day of July, one thousand nine hundred and fifty-eight.

Present: HON. CHARLES E. CLARK,
Chief Judge.

HON. JOHN C. PICKETT,
Circuit Judge.

HON. SYLVESTER J. RYAN,
District Judge.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALASTAIR KYLE, CLINTON GARDNER and TOYS OF THE WORLD CLUB, INC.,

Defendants-Appellants.

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Appeal from the United States District Court for the Eastern District of New York.

*Appendix.*

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.